

This second edition is intended to put corporate governance into its global context, to show its significance for modern business society.

Written by the leading practitioners within the field, **from 32 jurisdictions**, this second edition will be a useful, first-hand reference material for practising lawyers and in-house attorneys who may counsel clients on their business in foreign countries.

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'Corporate governance rules cause acute concern for companies interested in investing or doing business in foreign countries, hence the need for their in-house and external legal counsel. They are keen to see that the business environment of the host jurisdiction is compliant with global standards. A corporate governance regime with global standards is now an essential element of international business.' – Akira Kawamura

ISBN 978-0-414-05030-3



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SWEET & MAXWELL

CORPORATE GOVERNANCE
INTERNATIONAL SERIES

2ND EDITION



THOMSON REUTERS

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General Editor: Akira Kawamura *Anderson Mori & Tomotsune*

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Published in July 2015 by Thomson Reuters (Professional) UK Limited, trading as Sweet & Maxwell

Friars House, 160 Blackfriars Road, London, SE1 8EZ

(Registered in England & Wales, Company No 1679046.

Registered Office and address for service:

2nd floor, 1 Mark Square, Leonard Street, London EC2A 4EG)

A CIP catalogue record for this book is available from the British Library.

ISBN: 9780414050303

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PREFACE

Akira Kawamura | Anderson Mori & Tomotsune

Following the great success of the first edition of this Book, it was agreed by the authors and the publisher, Thomson Reuters, to publish this updated second edition. The original edition was first published in 2013. It is an unusually short period of time in which to release a second edition – just about two years. I am deeply impressed by the amount of support and willingness expressed by all of the authors to participate in this work again. I also greatly appreciate the initiative taken for this by the publisher and its editors.

I am fully aware of the reason why we must update the first edition in such a short period of time: corporate governance rules and systems are changing rapidly and dramatically in many jurisdictions in the world. I am certain that this second edition may provide the readers with a good, current and quick understanding of the rules prevailing throughout the present time global markets.

1. GLOBAL CORPORATE GOVERNANCE

Good corporate governance is a necessary pre-condition for corporate culture to flourish. It ensures that companies comply with the law and the ethical rules of societies and as such are good corporate citizens.

Good corporate governance is also a key factor for companies to raise funds from the most suitable capital markets in the world or to trade their financial commodities in the market places. Unless they prove themselves as being highly and legitimately managed under the commonly accepted corporate governance rules, businesses may no longer be admitted to the major markets.

It is also a key consideration for the regulators of the recipient countries to introduce the rules according to global standards into their own jurisdictions because these are critical criteria looked at by foreign investors when deciding where to invest. They owe substantive responsibilities to commit themselves with their own corporate governance rules that prevail in their own home jurisdiction. Therefore, the globally recognised rules can be considered to be an important business infrastructure in the recipient countries.

Another trend is the globalisation of both companies and their investors. Hence, corporate governance rules must also be of a global standard. Such rules from different jurisdictions influence each other and are becoming very much the same in most of the world's leading markets, although, needless to say, the US law has been, among those, the most influential and has in many ways dominated global rule making. We can say that global corporate governance is emerging and is well accepted in many jurisdictions around the world.

Thus, I think, good corporate governance is essential for the sustainable growth of the world economy.

2. GLOBAL FINANCIAL CRISIS

Corporate governance became a critical item on the agendas of regulators and law makers everywhere in the world in the years since the global financial crisis (GFC), which took place following the collapse of Bear Stearns Co Inc and Lehman Brothers Holding Inc in 2008. It triggered, as is well known, the collapse of many financial institutions, banks and investment banks in major jurisdictions in the United States, Europe and then, in other parts of the globe. The serious aftermath of the GFC is still being felt in many jurisdictions such as Spain, Greece or Italy.

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While there were many different reasons why rescue packages were or were not applied to the failed financial institutions, there was a common and important criterion, which was the ethical fairness of the corporate governance adopted by the board of such failed entity. It was observed that the people and their governments were not persuaded to help the collapsed entities unless they were successful in proving that they had been properly managed under a healthy corporate governance structure. If not, they were no longer admitted to play a role as corporate citizens.

3. ENRON AND THE SARBANES-OXLEY ACT

As early as 2002, the so-called Sarbanes-Oxley Act (SOX Law or Act) was introduced in the United States in reaction to a number of large corporate scandals revealed in that year. The largest one was the accounting fraud orchestrated by the board of Enron Corporation. It was said that it would have triggered a second Great Depression following the 1929 crisis, if a comprehensive reform of the management of corporate boards, as well as their accounting and audit systems and the professional services rendered by accountants and lawyers, was not introduced by way of the Act.

The Round Table Discussion on the rule-making to enforce the Act was held at the historic building that houses the United States Security Exchange Commission in Washington DC just before the Christmas holidays in 2002. I was invited to the Round Table as a panellist by the SEC. We discussed the scope of the cross-border reach that may be given to the Act and its subordinate rules. It was noted that the Act was intended to be a global rule and not just a national rule. As is seen in the following chapters of this book, the major principles of the Act have now been introduced and enforced in most of the major jurisdictions including Japan, Germany and so on.

4. COMMON ISSUES

As may be seen in the following chapters, there are many commonalities in the corporate governance rules of the jurisdictions covered in this book. The committees system of the board coupled with the independent directors, especially the independent audit committee, have been introduced in many jurisdictions after the introduction of the SOX Law and its subordinate rules. The power and functional support of independent committees may have to be introduced in many more jurisdictions.

Executive compensation is another hot issue: with the problem of so-called "say on pay". A large number of cases in this area have been instituted in many jurisdictions, especially in the United States. It is hoped that a sound standard for executive compensation will be established through those court cases.

Effective enforcement of the compliance programme developed under the SOX Law regime must be strengthened in many jurisdictions. In this regard, boards may have more practical powers to oversee the management of the companies.

Thus the topic of corporate governance is now an acute concern for the companies and their boards around the world. It is especially important for the companies that are active in multi-jurisdictional markets and hence, for their in-house counsels and outside legal counsels. They should keenly watch developments in corporate governance rules as an important part of the changing business environment.

5. LATEST DEVELOPMENTS AND THANKS

In the last few years, the corporate governance rules have been massively innovated in the most of the major markets. They

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include, for example, the introductions in some part of a Corporate Governance Code and/or the Stewardship Code. In my own jurisdiction, Japan, both of them, being recently introduced, have brought about substantial changes to and reform of the Japanese corporate and investment culture.

I am very much honoured to again undertake the General Editorship of this Book, catching up with the changes in present day corporate governance around the world. This should continue to be a unique and excellent source of legal information on this topic. More importantly, this is one of the most current and comprehensive reference books on the topic.

The authors who have kindly agreed to contribute their valuable time to contributing to this book again are literally the best and most prominent lawyers on the topic in their respective jurisdictions and are very well known as such throughout the world.

This Book provides the best and most practical first hand reference material for the lawyers and in-house counsels who may have opportunities to counsel clients on their business in foreign jurisdictions. I would like to thank the authors for their valuable contributions to this Book.

I wish to note with thanks again the Foreword written by Marty Lipton of Wachtell Lipton Rosen & Katz. He is the legendary corporate governance lawyer of our age and a prominent advisor to the boards of major American and global entities.

Since 1 July 2013 the threshold for having to disclose substantial holdings of capital or voting rights in listed companies was reduced from 5% to 3% and gross short positions have to be disclosed. The threshold to put items on the agenda was raised from 1% to 3%. Finally, the relevant Act contains a mechanism enabling a listed company to identify its “ultimate shareholder”. Furthermore the NCGC obliges a shareholder to consult with management 180 days prior to putting an item on the agenda, which gives management time to settle a discussion with the shareholder or to build up a defence.

FOREWORD

Martin Lipton | Wachtell, Lipton, Rosen & Katz

The core purpose of corporate governance is to build long-term sustainable growth in corporate and shareholder value for the benefit of all stakeholders. The vitality of the global economy depends upon our fostering a long-term orientation and resisting the pressure to measure success on the basis of myopic benchmarks. Corporate governance practices can, and should, vary across jurisdictions, and the treatment of the following key issues by boards, management, stakeholders and regulators has global relevance in determining a corporate governance profile that facilitates the creation of sustainable value and is fine-tuned to specific country and company circumstances:

- Establishing an appropriate “tone at the top” to actively cultivate a corporate culture that gives high priority to ethical standards, principles of fair dealing, professionalism, integrity, full compliance with legal requirements and ethically sound strategic goals.
- Partnering with management and advisors to review the company’s business and strategy and identifying and developing talent as part of robust succession planning.
- Organising the business, and maintaining the collegiality, of the board and its committees so that each of the increasingly time-consuming matters that the board and board committees are expected to oversee receives the appropriate attention of the directors.
- Understanding, and effectively evaluating, the ever-evolving legal rules, stock exchange requirements and aspirational ‘best practices’ that have come to have almost as much influence on board and company behaviour.
- Developing an understanding of shareholder and stakeholder perspectives on the company and fostering long-term relationships with shareholders and other stakeholders, as well as coping with escalating requests for meetings to discuss governance and business proposals, including employee lay-offs, stock buybacks, special dividends, spin-offs and other corporate transactions.
- Objective evaluation of activist agendas, notwithstanding the threat of proxy contests, with-hold-the-vote campaigns and other pressure tactics, to determine what will in fact further the best interests of the company and all of its constituents.
- Developing an understanding of how the company and the board will function optimally in the event of a crisis and proactively planning for a crisis.
- Ensuring appropriate procedures for review of transactions involving related persons or that could otherwise involve a conflict.
- Retaining and recruiting directors who meet the requirements for experience, expertise, diversity, independence, leadership ability and character, and providing compensation for directors that fairly reflects the significantly increased time and energy that they must now spend in serving as board and board committee members.
- Coping with the proliferation of new regulations and changes in the general perception of business that have followed the financial crisis.
- Addressing conflicts of proxy advisory firms and the shortcomings of one-size-fits-all governance checklists and

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resisting unsound demands of corporate governance activists that are not linked to true value creation.

- Achieving the delicate balance of enabling the company to recruit, retain and incentivise the most talented executives while avoiding media and populist criticism for inappropriate compensation.
- Dealing with populist demands, such as criticism of risk management, and the demands of the public with respect to health, safety, environmental and other socio-political issues in a manner that will pre-empt increased regulation and avoid escalation of unsound demands, while at the same time furthering the best interests of the company.

Considerable attention has been devoted to searching for lessons learned from the global financial crisis and ways to improve board functioning. Perhaps one of the most valuable “lessons learned” is that boards and regulators need to focus on what works, without the undue distraction of reform for reform’s sake and standardised mandates that pay lip service

to “best practices” but add little if any real value. Some of the other “lessons learned” include a renewed focus on risk management (including overseeing cybersecurity), a better understanding of the challenges faced by highly complex, global businesses and a rethinking of the experience and skill sets needed for an effective board.

In order to promote effective governance, the institutional, regulatory and governance environment must facilitate an adequate supply of quality directors who: (i) have sufficient knowledge of, and experience with, the company’s businesses, even if this requires a re-examination of whether the trend towards boards with only one non-independent director makes sense and results in boards with a greater percentage of directors who are not “independent”, (ii) are in sufficient number to staff the requisite standing and special board committees that handle much of the board’s work, (iii) are able to devote sufficient time to board and committee meetings, and the preparation for them, (iv) receive regular tutorials by internal and external experts as part of expanded director education and (v) are encouraged to maintain a true collegial relationship among and between the company’s senior executives and the members of the board.

THAILAND

Kasma Visitkitjakarn & Napat Siri-armart* | Tilleke & Gibbins

1. GENERAL PRINCIPLES

1.1 What are the general principles of corporate governance in your jurisdiction? What are the main objectives of the corporate governance principles? Is your legal system based on common law, civil law, Islamic law or something else?

The legal system in Thailand is based on civil law, in which all laws are embodied in statutes or codes. The company laws in Thailand include the Public Limited Companies Act B.E. 2535 (1992), as amended up to No. 3 B.E. 2551 (2008) (PLCA), the Securities and Exchange Act B.E. 2535 (1992), as amended up to No. 4 B.E. 2551 (2008) (SEA) and respective regulations in the Thai Civil and Commercial Code (CCC) for limited liability companies, which establish the primary regime of corporate governance for private limited liability companies, and, principally, set out the legal duties of directors to both the company and the shareholders, in general. Under the relevant provisions of the CCC, directors shall act with the duty of care, duty of loyalty, and the duty of due diligence, in managing the business of the company.

The fundamental principles of corporate governance generally include accountability, responsibility, equitable treatment and transparency. The corporate governance principles serve to promote and enhance the competitiveness of the company toward business prosperity, as well as to boost investors' confidence. A company with good corporate governance principles has implemented a proper, disciplined management system and a transparent working environment that promotes trust and confidence between shareholders/investors. As the intermediaries between the shareholders and the management, the role of directors of a company in managing business operations is integral to developing good corporate governance in a company.

1.2 Have there been any recent developments in the law, codes and rules of corporate governance?

The concept of good corporate governance principles gained its popularity in Thailand from the time of the 1997 financial crisis, and has been on the agenda of the Thai authorities since then. The Thai government designated 2002 as "The year of Good Corporate governance" and launched a number of important reforms. The National Corporate Governance Committee (NCGC) was established and chaired by the Prime Minister. In the same year, the Stock Exchange of Thailand (SET) introduced the 15 Principles of Good Corporate Governance as preliminary implementation guidelines for listed companies in Thailand, covering several importance corporate governance issues, including, inter alia:

- Equitable treatment of shareholders.
- Structure, responsibility and independence of the board of directors.
- Financial disclosure and transparency.
- Internal control.
- Rights of other stakeholders.

** The authors wish to thank Mureen Valentya, an intern in Tilleke & Gibbins' Bangkok office, for her valuable contribution to Corporate Governance – 2nd edition.*

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- Risk management policies.
- Connected transactions.
- Code of ethics.

The SET requires listed companies to disclose in their annual reports the implementation of the 15 Principles of Good Corporate Governance or the reason(s) for non-compliance.

The 15 Principles were subsequently revised in 2006 to become more comprehensive and comparable to the Principles of Corporate Governance of the Organization for Economic Co-operation and Development (OECD), and to include the World Bank's recommendations in its Report on the Observance of Standards and Codes related to Thai Corporate Governance. In 2012, the Principles were further adjusted to bring them closer in line with the ASEAN Corporate Governance Scorecard criterion.

The SET also established the Corporate Governance Centre in 2002 to serve as an advisory body for directors and executives of listed companies, in order to promote good corporate governance practices in such companies.

Aside from the Corporate Governance Centre, the Thai Institute of Directors Association (IOD) was founded in 1999 to provide assistance in regard to improving director professionalism and corporate governance in Thailand. The IOD assisted in the development of professional standards of directorship, and provided best practice guidelines for company directors to perform their duties effectively up to international standards.

1.3 Outline recent court cases and incidents involving corporate governance issues. Were there any significant corporate scandals or large unlawful corporate cases?

The commission of an offence involving corporate governance issues is generally settled by the relevant authorities through the payment of fines applicable to respective types of offences.

1.4 Which law enforcement agency is in charge of enforcing corporate governance? May a criminal sanction be levied upon infringement of the corporate governance rules?

The Department of Business Development (DBD), Ministry of Commerce, is a primary regulatory body, overseeing all matters concerning companies and other forms of business entities and keeping their profiles/information recorded properly. For listed companies, the Securities and Exchange Commission (SEC) has supervisory power and authority over securities companies, as well as companies whose shares are listed on the SET. The Bank of Thailand (BOT) also serves as the authority responsible for oversight of commercial banks and licensed entities. These regulatory bodies are authorised to issue regulations and guidelines, instigate inquiries and investigations, as well as to take action against wrongdoers.

The SEC has the authority to impose both legal and administrative sanctions against those who fail to comply with the rules and regulations. In particular, the SEC closely monitors and exercises control over connected transactions, takeovers, insider trading, market manipulation, corporate fraud, and breach of duty. Principally, the SEC assumes primary responsibility to gather evidence and investigate possible offences under the SEC's supervision; however, the SEC has no power to initiate or prosecute criminal proceedings with regard to the violation itself against the wrongdoers in its own name. If the investigation results in a conclusion that a criminal violation has occurred, the

SEC pursues the matter by filing a criminal complaint with the Royal Thai Police or the Department of Special Investigation (DSI), Ministry of Justice. In 2014, there were 22 cases of violations under investigation by the relevant authorities. Certain offences may be brought to the Settlement Committee appointed by the Minister of Finance, where if the fine is fully received within the period specified by the Committee, the matter would be considered settled.

2. SOURCES OF LAW

2.1 Which laws, codes or statutes govern company structures and organisations? Are there statutes like the Companies Act or other forms of law? Is there much relevant case law?

Company structures and organisations are governed by company laws, which include the PLCA and the SEA for public limited liability companies, and the respective provisions under the CCC for private limited liability companies and other types of business organisations. Moreover, the notifications issued under the SEA, the regulations of the SET, and the Capital Market Supervisory Board of the SEC are applicable to public limited liability companies having their shares listed on the SET and companies that are issuing securities to the public. Companies with certain types of businesses are also governed by business-specific laws, for example the Banking Act for banking and finance business; the Financial Business Act for commercial banking business, finance business and credit foncier business; the Life Insurance Act for life insurance business; and the Assurance Business Act for property insurance business.

2.2 Which laws, codes or statutes regulate capital markets in your jurisdiction?

The principal/primary statutes are the PLCA and the SEA, whilst the notifications issued under the SEA, the regulations of the SET, and the Capital Market Supervisory Board of the SEC also provide rules, regulations and guidance for the capital markets.

2.3 Are there any public interest laws which apply to or influence corporate governance?

Public interest is protected by the provisions in the CCC, which deem an act that contains objects expressly prohibited by law or is impossible or is contrary to public order or good morals as void. This applies to every person, be it a natural or juristic/legal person. Business-specific laws, such as The Banking Act, Financial Business Act, Insurance Act, Factory Act, Food and Drug Act, Environment Act and Industry Act, also specify that business operators shall conduct their businesses in a certain manner prescribed by those laws and establish their own code of conduct. Failure to comply with those specific laws will result in civil and/or criminal penalty.

2.4 Have there been any recent developments in any of the above laws? What are the recent changes to the above laws or rules and the reasons for them?

The latest amendment to the SEA was made in 2008, with the aims to strengthen all parties' commitment to develop efficient, transparent and audible management systems that are comparable and compatible with international governance standards, as well as to enhance the efficiency of the SEC's supervisory roles.

3. SHAREHOLDERS AND THE SHAREHOLDERS' MEETING

3.1 How are shareholders' interests represented in the company? How are the shareholders assured exercise of their rights? What is the highest governing body within the company structure if it is not the shareholders' meeting?

The basis for shareholders' rights, interests and powers are provided in the PLCA for public limited liability companies and the relevant provisions of the CCC for private limited liability companies, both of which set out the rights of shareholders, regulations concerning shareholders' meetings, procedures to summon shareholders' meetings by the request of the shareholders and notice of the meeting, as well as voting and proxy matters.

Through attending and voting at the shareholders' meeting, the shareholders exercise their rights and control over the company's affairs in matters that are proposed by the board of directors, pursuant to the articles of associations, or those that are specifically required by law to be resolved at the shareholders' meeting. All shareholders have the right to attend and vote at the meeting. Shareholders holding ordinary shares have one vote per share. A proxy may be appointed by a shareholder to attend the meeting in its place. Generally, a simple majority vote of the shareholders attending the meeting is required for ordinary matters, whilst certain matters, for example amalgamation of the business, capital increase and decrease and amendment of the memorandum of association and articles of associations, would require a shareholders' resolution by vote of not less than three-fourths (known as a special resolution) of the total number of votes of shareholders attending the meeting and having the right to vote. In the event of a deadlock, the chairman who presides over the meeting shall have a casting vote.

Furthermore, for public limited companies, the PLCA specifies certain material matters that require the shareholders' special resolution, which include, inter alia:

- The sale or transfer of the whole or important parts of the business of the company.
- The purchase or acceptance of transfer of the business of other companies, or the making, amending or terminating of contracts regarding the grant of a lease of the whole or important parts of the business.
- The assignment of the management of business of the company to any other persons.
- The amalgamation of the business.

Additional matters requiring special resolution of the shareholders may be prescribed in the articles of association of both public and private limited liability companies. In addition, the SET and SEC Rules and Regulations contain additional requirements on matters that require the shareholders' approval, for example the acquisition or disposal of material assets, connected transactions and corporate takeovers by partial tender offers.

Other matters, which are not required by laws or the articles of association of the company to be considered by the shareholders, are generally considered and managed by the board of directors of the company.

3.2 How is the shareholders' meeting conducted? Who may chair the meeting? May attendance (not voting) at the meeting be restricted only to the shareholders? Are the shareholders allowed to be accompanied by legal or other counsel?

With respect to the shareholders' meeting, the statutes require a company's board to hold an annual general meeting of shareholders (AGM) within four months after the end of the company's fiscal year.

An extraordinary general meeting of shareholders (EGM) may be convened any time the board considers it expedient to do so. Further, shareholders holding at least 20% of the issued shares, or, in a case of public limited liability companies, shareholders holding at least 20% of the issued shares or 25 persons holding at least 10% of the issued shares, may request in writing for the board to call for an EGM by specifying the matters to be considered. For listed companies, the shareholders who hold shares and have the right to vote of not less than 5% of the total number of the voting rights of the company may also submit a written proposal to be included as an agenda for consideration at the shareholders' meeting. The EGM shall be held/convened within one month of the date of receipt of the shareholders' request. The chairman of the board shall preside over the meeting of shareholders, but if there is no chairman, the attending shareholders shall elect one amongst themselves to preside over the meeting.

The law requires the notice of shareholders' meeting to contain adequate information, such as the time and place of the meeting and the agenda. Notice shall be delivered to the shareholders (and the Registrar of the DBD in the case of public limited companies) at least seven days prior to the date of meeting – a longer notice period of 14 days is required for certain matters as specified by law. The notice must also be published in a newspaper. Only the shareholders are entitled to attend and vote at the meeting; save for the fact that they may appoint a proxy to attend and vote on their behalves, provided the procedural rules under the CCC, the PLCA and the SEA concerning the appointment of proxy (or in the case of listed companies, a "proxy solicitation") are duly complied with. No other person may attend and vote at the shareholders' meeting, except by way of due appointment of proxy and/or approval by the board.

3.3 How are minority shareholders' rights protected?

In general, the rights of minority shareholders are governed by the CCC, the PLCA and the SEA, which include the following rights, among other things:

- The right to require the company to convene an extraordinary meeting of shareholders.
- The right to consider and approve resolutions for matters which are required by statute to be passed by the shareholders, such as changes of the memorandum of associations, articles of association, increase or decrease of capital, dissolution, liquidation and amalgamation and so on.
- The right to request the competent officer to appoint an inspector to examine the business of the company.
- The right to apply to the court for revocation of any resolutions, which are passed contrary to the provisions under the laws or to the articles of associations.
- The right to bring an action against the directors for breach of their director duties (for example duty to exercise due care and diligence and so on), in a case where the company refuses to do so.

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Further, minority shareholders can also negotiate to have certain important matters reserved, for which any amendments will require their consent. Apart from the important matters which need to be fixed and require consent of the minority shareholders, shareholders can also agree to fix (if/where applicable) additional rights of the shareholders, which includes without limitation, the following:

- Right of first refusal if the other shareholders wish to transfer shares.
- Tag along and drag along rights and similar or other rights.
- Fixing the quorum of the meetings of both shareholders and directors to include the presence of the minority shareholder or the director nominated by the minority shareholder, as the case may be.

3.4 Is shareholder activism encouraged or discouraged? If not encouraged, how is it regulated?

In general, the CCC, the PLCA and the SEA encourage shareholder activism. In particular, the latest amendments to the SEA have enhanced protection of shareholders' rights significantly through:

- The shareholders' ability to propose agenda items for the shareholders' meetings.
- Channels for shareholders to seek legal redress, whereby they are entitled to file, on behalf of the company, a claim to disgorge undue benefits obtained by the company's directors or executives in bad faith.
- The shareholders' ability to sue for damages from disclosure of falsified information.

In addition, the amendment of the SEA in 2008 brought the possibility for shareholders to file a derivative suit with more convenience and less cost against the company's directors who violate their duties.

3.5 How are professional shareholders (those minority shareholders who seek some extra benefit from companies by unduly and habitually influencing management by using their shareholding) treated by the law? Are they excluded from attending the shareholders' meeting? Are they criminally or otherwise publicly sanctioned?

At present, there are no specific regulations concerning professional shareholders under Thai company laws. Nevertheless, the board of directors of a company is entitled to initiate/bring a civil or criminal action against a shareholder who has acted in an adverse, disruptive manner or in bad faith to the company.

3.6 Are shareholders' benefits given to some of the shareholders by the company without resolution by the shareholders' meeting prohibited or regulated by the law or other rules?

For private limited liability companies, the CCC is silent in regard to legal requirements on conferring benefits to shareholders by the company. On the other hand, for listed companies, the board's or the shareholders' approval is specifically required for a connected transaction between the company and the major shareholders. The major shareholder is defined to mean those who hold, directly and indirectly, more than 10% of the issued shares with voting rights, and including the shares held by related persons.

The SET views that a connected transaction may result in a conflict of interest between the majority of the shareholders and a company. With the objectives of transparency and integrity in mind, the SET issued rules in regard

to entering into connected transactions, aiming to eliminate the possibility of a conflict of interest. The procedural requirements vary, depending on the type and size of the transactions. The board's approval and disclosure to the SET are required for a transaction that is valued over the 0.03% of net tangible assets (NTA) but less than 3% of the NTA, or over THB1 million but less than THB20 million, whichever is higher. Shareholders' approval will be required where the value of the transaction is not less than THB20 million, or 3% of the NTA, whichever is higher.

4. DIRECTORS AND BOARD OF DIRECTORS

4.1 What are the functions and responsibilities of the directors and the board of directors? Do you have a one- or two-tier board system? What are the outside directors called?

At present, Thailand has a one-tier board system, though transitioning into a two-tier structure has been considered. In conducting the business, a director shall perform his or her duty with responsibility, due care and loyalty and shall comply with all laws, the objectives of the company, the articles of association of the company, the resolutions of the board of directors and the resolutions of shareholders' meeting, to promote the best interests of the company. If the directors duly conduct the business in good faith, consistent with the articles of associations and the shareholders' resolution, the directors are generally considered to have performed their duties with responsibility and due care and diligence. Aside from their statutory duties stipulated in the CCC, the PLCA, and the SEA, the scope of authority and duties of the directors may also be provided in the articles of association of the company, or by resolution of the shareholders' meeting. The directors must attend the meeting of the board of directors themselves and cannot appoint proxies. A circular meeting of the directors is also not permitted.

For private limited liability companies, the CCC does not specify the minimum and maximum number of directors, nor does it require the company to have a different set of directors, such as an audit committee. On the other hand, the board of directors of public limited liability companies shall consist of not less than five members, at least half of whom must reside in Thailand, and meet qualifications prescribed under the PLCA.

Further, the directors of public limited liability companies must not undertake commercial transactions of the same nature as and competing with that of the company, nor be a partner or a director in other business entities carrying on business of the same nature as and competing with that of the company, unless he or she has informed a general meeting of the shareholders in advance. The rules governing the connected transactions are also applicable to transactions between the company and the directors. In addition, under the SEC rules, the directors must make full disclosure of their shareholdings in the company, which shall include shareholdings of their spouses and any minor children.

4.2 What are the rules that may give rise to civil and criminal liability of the director(s)? How are those liabilities sought?

Directors of companies are expected to perform their duties as required under the laws in the best interests of the company and of the shareholders. Directors are, to some extent, protected from personal liability if actions are taken in good faith and in the best interests of the company and decisions are made with due care and free of conflicts of interest. Nonetheless, directors will be held liable for damages caused by them to the company for a breach of their duties. A civil action may be brought by the company (or shareholders, if the company refuses to do so) or creditors.

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Aside from civil liabilities, the laws also impose a criminal penalty on certain offenses committed by a company, and the directors who are responsible for the commission of such offenses. Directors who commit fraudulent acts and insider dealings can also be prosecuted, where directors of the listed companies are subject to more severe penalties primarily due to the public investment in such companies. The penal provisions for these offenses are contained in both the PLCA and the SEA. For private limited liability companies, the criminal sanctions appear in the Act Prescribing Offences Related to Registered Partnerships, Limited Partnerships, Limited Companies, Associations, and Foundations, B.E. 2499 (1956).

4.3 Does the board of directors have a committee system, for example nomination committee, compensation committee, audit committee? If not required, is it common practice for companies? How does it function?

Private limited liability companies and public limited liability companies, whose shares are not listed on the SET, are not subject to any statutory requirements to have a committee system.

However, for listed companies, audit committees have been compulsory since 1998. The audit committee shall be comprised of at least three directors, all of whom should be independent and have at least one with expertise in accounting or finance. To promote transparency and acceptability, the audit committee's function is to assist the management in providing an independent review of the effectiveness of the financial reporting process and internal control of the company. Nonetheless, the corporate governance principles issued by the SET recommend the implementation of a remuneration committee and nomination committee to be responsible for the consideration of remuneration and the recruitment of candidates for directors for the board's approval; the relevant guidelines were first issued in 2008. This is, however, merely a recommendation and not a mandatory requirement.

4.4 Is it a legal requirement to have an independent director or a third party director? If so, how are they appointed? Is it required for listed companies?

An independent director or a third-party director is not required for private limited liability companies and public limited liability companies. Listed companies are required by SEC notifications and SET regulations to have independent directors make up constituting at least one-third of the members of the board, but there shall not be less than three independent directors. An independent director shall not hold more than 1% of shares in and be an executive or employee of the company, nor have affiliation with the management, executives or major shareholders of the company.

4.5 How is the compensation for directors or officers determined? Can it be contested by the shareholders or the regulatory authorities? What are the common rules or practices for the compensation of officers?

Unless otherwise provided in the articles of association of the company, the compensation for directors is determined by the shareholders' meeting, while remuneration of the officers may be considered by the board of directors. While a simple majority vote at the shareholders' meeting is required for private limited liability companies, the resolution of the shareholders' meeting of public limited companies requires at least two-thirds of the total number of votes of the shareholders attending the meeting.

With respect to the level of compensation, the amount of remuneration of the directors of a company should be comparable to that of other companies in the same or similar industry in which the company operates. Other factors that should also be taken into account in fixing the remuneration include the experience, qualification, obligation, scope of duties and responsibilities, as well as their respective performance and contributions to the company.

4.6 How will the board handle a corporate crisis like an internal criminal case, violence, social media exposure or dawn raid by the authorities?

There are no specific rules or regulations governing this matter. The practice of each board will largely depend on the company's internal policy in regard to their management of risk and damage, consistent with the disclosure rules applicable to listed companies.

5. BOARD OF AUDITORS, AUDIT COMMITTEE, ACCOUNTING AUDITORS

5.1 How is the internal accounting and legal audit structured and conducted? Is an outside accounting audit required and, if so, how is it structured? Are there requirements to change the auditor every five years?

A certified external auditor shall be appointed annually at the ordinary meeting of shareholders, where the retired auditor may be re-elected. Shareholders of the company may be appointed as auditors, but directors, agents, employees, or any person holding a position in the company is not eligible for such appointment during its occupation therein. For listed companies, the SEC requires listed companies to appoint SEC-approved auditors only, who shall be rotated every five years for audit partners with a particular client. As a practical matter, the audit committee would consider and select the auditor for proposal to the board of directors, and subsequently to the meeting of shareholders for consideration and approval.

5.2 Are there supervisory auditors? What is the function of the supervisory auditors' board?

Not applicable.

6. MARKET DISCLOSURE/TRANSPARENCY TO THE SHAREHOLDERS AND THE PUBLIC

6.1 What are the disclosure requirements for companies in your jurisdiction under company law, capital markets law or any other rules?

Generally, Thai companies are required, at a minimum, to prepare and submit an audited financial statement to the relevant authorities.

Public limited liability companies are also required to prepare a directors' report in addition to the financial statement. Such report must contain at least:

- The company's name, location of the head office, category of business and number and type of all the shares sold of the company, including the number and type of shares of affiliated companies held by the company – or shares of any other companies in which the company holds 10% or more of the number of shares sold of such other companies.

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- A director's interest in any contract which is made by the company.
- Shares, debentures, remuneration or other benefits received by each named director of the company.

The SEA provides more detailed disclosure requirements. Financial reports (which must be reviewed by SEC-approved auditors), an annual information disclosure form, an annual report form and news on significant changes (such as cessation of business operations, sale and purchase of important assets, change in control and capital and so on) shall be made available to shareholders and investors.

In addition, the SET's Principles of Corporate Governance recommend a number of best practices on the issue of disclosure:

- (i) The annual statements and annual reports should be up to date and disclosed in both Thai and English via alternative channels (for example the company's website).
- (ii) The company shall report a summary of its corporate governance policy and the implementation thereof through annual reports and its website.
- (iii) Annual reports shall contain a statement of directors' responsibilities, along with an auditor's report.
- (iv) The company shall disclose the roles and responsibilities – including the number of meetings and attendance of each director and performance results during the year – of the board of directors and its subcommittees.
- (v) Directors' and executives' remuneration policies, fees paid by subsidiaries (if one serves as a director in the company's subsidiaries as well) and the amount of the payment shall also be disclosed.

Aside from the above, with the principle that investors of listed companies shall be entitled to enjoy equal access to information necessary for informed investing in securities, the SET sets forth guidelines concerning disclosure in six areas as follows:

- Immediate public disclosure of material information.
- Thorough public dissemination.
- Clarification or confirmation of rumours and reports.
- Response to unusual market activity.
- Unwarranted promotional disclosure.
- Insider trading.

6.2 What is the liability or responsibility of the board in relation to the company's disclosure requirements?

Failure to comply with disclosure requirements would subject the company and the authorised director to the applicable penalties, including fines, prescribed under the laws.

For listed companies, the board shall make all important information relevant to the company – be it financial or non-financial information – available to interested parties by disclosing it correctly, accurately, in a timely

manner and transparently through channels that are easy to access, fair and trustworthy, in accordance with the SEC notifications and the SET regulations. Pursuant to the provisions of the SEA, if a disclosure contains a false statement or exposes material facts, the board shall be jointly liable for any damages arising from it.

7. M&A AND CORPORATE GOVERNANCE

7.1 Upon an M&A offer, how are the transparency and fairness rules of the company provided under the company and stock market laws and rules?

With respect to an M&A, including acquisition of assets or shares, Thai companies are subject to certain disclosure and voting rules and requirements. As mentioned above, for public limited companies, the PLCA specifies certain material matters that require the shareholders' special resolution (affirmative votes of at least three-quarters of the votes of the shareholders attending the meeting and entitled to vote at the meeting), which include, inter alia:

- The sale or transfer of the whole or important parts of the business of the company.
- The purchase or acceptance of the transfer of the business of other companies, or the making, amending or terminating of contracts regarding the grant of a lease of the whole or important parts of the business.
- The assignment of the management of the business of the company to any other persons.

For listed companies, acquisition or disposal of assets valued at not less than 50% of the total assets shall require the shareholders' approval; whereby the approval shall be granted by a vote of not less than three-fourths of the total number of votes of the shareholders who attend the meeting and who are entitled to vote, excluding those of interested shareholders. Further, the opinion of the independent financial advisor in connection with the transaction will be required, and delivered to the Board of Directors, the SET and the shareholders. Such opinion shall be in regard to, inter alia, the reasonableness and benefits of transactions to a listed company and the fairness of the price and conditions of such transactions.

For amalgamation of the business, the affirmative votes of at least three-quarters of the votes of the shareholders attending the meeting and who are entitled to vote at the meeting shall be required, and in a case of, or cases involving, private limited liability companies, the procedural requirements prescribed under the CCC, must be observed, which include written notification to the creditors, publication in the newspapers and a resolution to approve amalgamation of business. Listed companies are also required to disclose the information thereof in accordance with the relevant SET's regulations.

With respect to public limited liability companies, if a shareholder objects to the amalgamation, the company is required to request the dissenting shareholder to sell his or her shares. If such shareholder refuses to sell the shares within 14 days of the request, the company may proceed with the amalgamation and the shareholder shall automatically become a shareholder of the amalgamated new company.

In regard to notification made to a company's creditors, a company shall inform them of their right to raise an objection to the amalgamation within two months of the date of receipt of such notice. If faced with objection, the company may not proceed with the amalgamation unless it has settled the debts or provides security for such debts. The board must apply for registration of the amalgamation within 14 days from the last day of the two-

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month objective period given to the creditors, if there is no objection raised, or 14 days from the date the debts are settled or security is given, if faced with the creditors' objection. In any event, the company shall be required to file a memorandum of association and the articles of association of the amalgamated new company with the registrar.

8. PROXY FIGHTING

8.1 Is proxy fighting customarily conducted for control of the company management or anything else? How is it regulated under the company law or market regulations?

Even though shareholders may appoint a proxy to attend the shareholders' meeting and vote on their behalf, vote lobbying is not permitted. In terms of proxy solicitation or similar conduct to entice shareholders to give proxy to the person doing such act or any other persons to attend and vote at the shareholders' meeting on their behalf, such is allowed under the SEA, provided that the rules, conditions, and procedures prescribed in the SEC's regulations are duly complied with.

9. OFFICERS' REMUNERATION RULES

9.1 How is remuneration of officers determined? By whom? Is there a role for the shareholders' meeting? Is there any mechanism for an independent body to review and evaluate them?

Please see paragraph 4.5 above.

9.2 Is the mechanism of officers' remuneration publicly debated?

No, as the remuneration is ultimately determined by resolution of the shareholders' meeting or the remuneration committee (where applicable).

10. DIRECTORS' LIABILITIES, LIABILITY INSURANCE, INDEMNIFICATION

10.1 What are the directors' responsibilities and liabilities under the law? Can those liabilities be covered by insurance? Can it be indemnified by the company or other related parties?

Under Thai company laws, directors are primarily subject to fiduciary duties to manage and conduct the business in good faith, with the due care and diligence of a careful businessman or woman, as well as free from conflict of interests. In other words, the directors are expected to perform their duties with such care, including making reasonable inquiry, as an ordinary prudent person in such position would use under similar circumstances, in order to promote the best interests of the company and its shareholders. The directors of the public limited liability companies shall observe stricter rules as prescribed under the relevant notifications and regulations. Directors are held accountable and liable for damages caused by them to the company and claims can be brought against the company by the company (or shareholders if the company refuses to do so) or creditors.

Directors and officers liability insurance provides financial protection to individuals for any liability imposed on them whilst acting in their capacity as a director or officer for wrongful acts, errors, omissions, misstatements, misleading statements or neglect or breach of duty by the directors or officers. The coverage may be customised to suit one's

needs and circumstances, and commonly includes advancement of defence costs where the company cannot provide such costs, and reimbursement for indemnification of directors and officers for any awards, judgments, settlements and associated defence costs where the company has indemnified the insured for loss.

11. SHAREHOLDERS' DERIVATIVE SUITS

11.1 Is a shareholder's derivative suit provided for by law in your jurisdiction? How is it enforced by the shareholders?

A shareholder's derivative suit is generally allowed under the laws for civil lawsuits only against the directors of the company, provided that the company fails to initiate the action against the directors. In exercising the right to bring the shareholder's derivative suit against the directors, one must observe the statutory requirement or criteria prescribed by the CCC, the PLCA, and the SEA.

In this respect, the CCC does not specify the minimum number of shares held by a shareholder as a criterion for bringing such suit. On the other hand, under the PLCA, the lawsuit against the directors could only be instigated by the shareholders of public limited liability companies holding shares of, or amounting to, not less than 5% of the total number of company shares sold; whilst the minimum number of 5% of the total number of voting rights of the listed company is imposed as a criteria for listed companies under the SEA. The shareholders may apply for a court order to remove such director, and/or award of actual expenses incurred in bringing the suit against the director on behalf of the company.

11.2 Have there been any recent relevant court cases on the subject?

The latest judicial decision on this subject is Supreme Court Judgment No. 11710-11711/2556, which affirms the rulings that a derivative suit against a director could be filed only when the company failed to do so, and could not be filed against any third party.

12. SOCIAL INTEREST IN CORPORATE BEHAVIOUR

12.1 How is a company in your country expected to deal with the following issues: corporate social responsibility; gender, racial and social diversification; environmental issues; ecology and corruption?

Corporate social responsibility (CSR) gained its prominence in Thailand in 2006, when the SET formally established the CSR Working Group and subsequently the CSR Club in 2009. Being seen as an important contributing factor to the good image of a company, CSR has become a widely accepted practice amongst Thai companies.

CSR information and activities are shared amongst listed companies on a website hosted by the SET, whereon guidelines and principles concerning and manuals on CSR are readily available and accessible. In reviewing said guidelines and principles, one will notice that they are largely based on ISO 260000 and influenced by other international CSR instruments such as the UN Global Compact and GRI. The guidelines cover various aspects of CSR, including, without limitation, fair commercial and labour practice, anti-corruption, consumer responsibility and social and community development, as well as environmental issues. Examples of relevant regulations include:

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- For environment: Environment Development and Preservation Act B.E. 2535, Industrial and Factory Act B.E. 2535, including the ordinances of the Ministry of Industry, Energy Act B.E. 2535, which includes the orders of the Office of the National Environment Board and ordinances and orders of the Ministry of Science and Technology.
- For social aspects: Abatement of Taxation in Charitable Payment in Support and Development of Disabled Life Act B.E. 2550, including measures issued under a number of regulations, aiming to enhance a disabled person's life, the Revenue Code and its orders and ordinances.
- For consumers: Consumer Act B.E. 2522, Act on Liability for Damage Arising from Unsafe Products B.E. 2551.
- Safety: ISO 180000; Ministerial Regulations on management of Safety in Life, Health and Working Environment B.E. 2549.
- Labour: Labour Protection Act B.E. 2551, Self Declaration on Thai Labour Standards MorRorThor. 8001-2546, Improvement of Working skilled B.E. 2545 and international labour standards based on the International Labour Organization.
- Gender, racial, and social diversification: Labour Protection Act B.E. 2551.
- Corruption: Money Laundering Prevention and Suppression Act B.E. 2542, Organic Act on Counter Corruption B.E. 2542, Civil Service Act B.E. 2551, Act Governing Liability for Wrongful Acts of Competent Officers B.E. 2539 and regulations and directives governing the conduct of government employees.

With full implementation of the ASEAN Socio-Cultural Community (ASCC), along with the establishment of the ASEAN Economic Community (AEC), CSR is expected to be on the forefront of companies' agendas in their business operations.

13. REGULATORY FRAMEWORKS FOR PROFESSIONAL INVESTORS

13.1 How are professional investors (like pension funds or investment funds) required or encouraged to exercise their power for the good corporate governance of the company? Are they required to comply with rules like the Stewardship Code?

Professional investors are required to conduct their investment strategy with care by using their utmost fiduciary skill, knowledge and readiness of qualified personnel and operating systems – all of which are part of promoting good corporate governance.

Thailand does not have a specific set of rules published by independent government bodies in regard to the engagement between professional investors and investee companies like the Stewardship Code published by the UK's Financial Reporting Council or Japan's Financial Services Authority. The prevailing provisions dedicated to funds management seem to put more emphasis on the client-professional investor relationship, rather than the professional investor-investee company relationship. Nevertheless, the provisions governing stewardship are reflected through various notifications of the SEC.

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